No. 22-2168

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NTE CAROLINAS II, LLC; NTE CAROLINAS II HOLDINGS, LLC;
NTE ENERGY, LLC; NTE SOUTHEAST ELECTRIC COMPANY, LLC;
NTE ENERGY SERVICES COMPANY, LLC; AND
CASTILLO INVESTMENT HOLDINGS II, LLC,
Counterclaimants-Appellants,

v.

DUKE ENERGY CAROLINAS, LLC, DUKE ENERGY PROGRESS, LLC, AND DUKE ENERGY CORPORATION
Counterclaim Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of North Carolina at Charlotte,
No. 3:19-cv-00515-KDB-DSC, Hon. Kenneth D. Bell

AMICUS CURIAE BRIEF BY THE AMERICAN ANTITRUST INSTITUTE ON BEHALF OF COUNTERCLAIMANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Appellate Rule 26.1(a), the American Antitrust Institute states that it is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporations have an ownership interest in it.

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INTEREST OF AMICUS CURIAE[1]

AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.

Amicus' interest in this matter is that the organization is a public interest advocate seeking to improve the administration of the antitrust laws and to ensure that antitrust enforcement best serves the interests of competition and consumers. The Court's decision in this matter affects the Amicus because those goals cannot be achieved if the enforcement under Section 2 of the Sherman Act is weakened so that monopolists in regulated industries are free to manipulate their contractual relationships to maintain their monopoly position.

[1] All parties consent to the filing of this amicus brief. No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person—other than amicus or their counsel—has contributed money that was intended to fund preparing or submitting this brief. Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions.

INTRODUCTION

Any case brought under Section 2 of the Sherman Act necessarily asks two questions: does the defendant have monopoly power, and did it use that power to anticompetitive effect? In ruling on Duke Energy's motion for summary judgment, the district court agreed with NTE that a reasonable jury could find Duke Energy is a monopolist, and as such, able to wield its power in a "myriad" of ways—some legitimate and others illicit. Assessing Duke Energy's actions, however, the district court struggled to draw the line between anticompetitive and supposedly "severely competitive" conduct. Slip Op. at 9. Misreading key precedent, the court ultimately drew the wrong line, pushing that boundary far into the territory of the clearly anticompetitive. As a result, it incorrectly found against NTE on its Section 2 claims, despite unequivocal evidence of Duke Energy's successful efforts to preserve its monopoly by derailing a new, highly efficient competitor. Two of the district court's misreadings are particularly pernicious. If the district court's position on these points is allowed to stand, the consequences for Section 2 enforcement will be significant. Limiting Section 2 liability as the district court did here would allow Duke Energy, and other monopolists in regulated industries, a nearly unfettered ability to manipulate their contractual relationships to stifle new competition.

First, the court misinterpreted precedent and required that each component of a multi-pronged scheme, considered individually and in isolation, satisfy the Section 2 standard. This is contrary to both the Supreme Court's mandate that anticompetitive

conduct be considered as a whole and how circuit courts around the country have applied that mandate. Assessing the cumulative effect of the defendant's actions is a necessary step in a Section 2 analysis, especially when a plaintiff, as here, alleges interrelated actions aimed at a common, anticompetitive goal. The district court erred when it failed to conduct that analysis, and that mistake led it to the wrong conclusion on summary judgement.

Second, the district court artificially limited the scope of an actionable refusal to deal claim in ways that leave only an impossibly narrow remnant of liability. First, by making FERC's regulatory overlay an immediate disqualification for a refusal to deal claim rather than just a factor in its Section 2 analysis, the district court confused the Supreme Court's treatment of regulation in *Verizon Commuc'ns, Inc. v. L. Offis. of Curtis V. Trinko*, *LLP*, 540 U.S. 398 (2004), with the entirely different and here unexamined question of implied immunity. Then, by misreading the Supreme Court's description of the refusal to deal claim in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), as exclusive of all others, the district court transformed the merely descriptive into the proscriptive. As a result, the district court applied to its refusal to deal analysis an overly stringent and incorrect test for Section 2 liability that requires a prior course of dealing be fully voluntary. Accordingly, it failed to perform the fact-based assessment required by *Aspen Skiing* of whether the termination excluded a competitor "on a basis other than efficiency."

ARGUMENT

I. THE DISTRICT COURT FAILED TO ANALYZE DUKE ENERGY'S ACTIONS AS A WHOLE AS REQUIRED BY SUPREME COURT PRECEDENT

NTE provided evidence that Duke Energy engaged in a multi-pronged "combat strategy" orchestrated at the highest levels of the company to contain the competitive threat posed by NTE. Further, NTE showed that Duke Energy did so not based on a more competitive offering but precisely to avoid having to improve its efficiency or lower its price. The district court did not seem to dispute this set of facts but nevertheless refused to even consider the cumulative anticompetitive effect of Duke Energy's conduct. Instead, the district court divided up the scheme into different categories of antitrust claim (refusal to deal, predatory pricing, defamation, sham litigation, etc.). The court then concluded that each part of the scheme failed the specific stringent "test" it applied to that category of claim. The court granted summary judgment on that basis, claiming that Section 2 requires at least one independently illegal act. In the court's view, it was "in simple mathematical terms, 0+0=0." Slip Op. at 10.

This approach is contrary to precedent and a dangerous limitation on Section 2 enforcement. This is particularly so where it is alleged that a defendant has engaged in mutually reinforcing actions aimed at a common goal—here, the containment of a new, highly efficient competitor. *See Continental Ore Co. v. Union Carbide & Carbon*

Corp., 370 U.S. 690 (1962); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

A. Precedent Demands Consideration of the Cumulative Anticompetitive Effect of Duke Energy's Actions

In *Continental Ore*, a unanimous Supreme Court admonished the Ninth Circuit Court of Appeals for treating the plaintiff's Sherman Act Sections 1 and 2 antitrust claims "as if they were five completely separate and unrelated lawsuits." *Cont'l Ore Co.*, 370 U.S. at 698-99. After vacating and remanding the judgment, the Supreme Court held that an antitrust matter is "not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Id.*; *see also Aspen Skiing.*, 472 U.S. 585, 599 (1985) (approving that "the Court of Appeals considered the record 'as a whole' and concluded that it was not necessary for Highlands to prove that each allegedly anticompetitive act was itself sufficient to demonstrate an abuse of monopoly power"); *City of Anaheim v. S. Ca. Edison Co.*, 955 F.2d 1373, 1376 (9th Cir. 1992) ("[I]t would not be proper to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect."). As such, "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping this slate clean after each." *Cont'l Ore*, 370 U.S. at 698-99.

Following the Supreme Court mandate*,* appeals courts have routinely instructed courts to conduct an assessment of cumulative anticompetitive effect in

Section 2 cases. *See, e.g.*, *LePage's, Inc. v. 3M*, 324 F.3d 141, 162 (3d Cir. 2003), ("The relevant inquiry is the anticompetitive effect of [the defendant's] exclusionary practices considered together."); *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 108 (3d Cir. 2010) (holding courts must take anticompetitive conduct "as a whole" when evaluating whether required injury to competition was met under Section 2); *City of Anaheim*, 955 F.2d at 1376 ("[I]t would not be proper to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect."); *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 653-54 (2d Cir. 2015) (examining plaintiffs' claims and proof as a whole and for synergistic effects); *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, 368 F.2d 679, 691 (8th Cir. 1966) ("[A]n act in itself may be legal, but it still may become involved in an antitrust violation when it is 'part and parcel of unlawful conduct or agreement with others or conceived in a purpose to unreasonably restrain trade, control the market, or monopolize . . . We must consider the evidence as a whole."); *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1161 (7th Cir. 1983) (finding Section 2 liability because "damages ar[o]se from a series of unlawful acts intertwined with one another."); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1443–44 (6th Cir. 1990) ("The [factfinder] is entitled to look at the whole picture with respect to allegations and evidence of Sherman Act Section 2 violations.") (internal citation omitted).

To ignore the aggregate and synergistic effects of monopolistic acts would carve a vast loophole in Section 2. Without analyzing each of a monopolist's actions in the context of the whole, a factfinder cannot see the conduct's full anticompetitive impact and may not see its anticompetitive nature at all. In other words, a proper Section 2 assessment requires more than the "simple mathematics" the district court applied. *See* Slip Op. at 10. Adopting such a myopic approach to complex anticompetitive schemes would create a dangerous blind spot that would allow monopolists to evade liability. *See City of Groton v. Connecticut Light & Power Co.*, 662 F. 2d 921, 929 (2d Cir. 1981) (holding the proper inquiry is whether, qualitatively, there is a synergistic effect."); *see also City of Anaheim,* 955 F.2d at 1376 ("[I]t would not be proper to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect."); Christopher R. Leslie, *The Probative Synergy of Plus Factors in Price-Fixing Litigation*, 115 Nw. U. L. Rev. 1581, 1646-47 (2021) (comparing the outcomes of concurrent antitrust litigation to conclude that those opinions which "compartmentalized" individual allegations allowed sophisticated defendants to "evade antitrust liability").

Overlooking the cumulative effect of a defendant's conduct is particularly inappropriate at the summary judgment stage. As Judge Posner famously wrote, the "trap to be avoided in evaluating evidence of an antitrust [violation] for purposes of ruling on the defendants' motion for summary judgment is to suppose that if no single item of evidence presented by the plaintiff points unequivocally to [a violation],

the evidence as a whole cannot defeat summary judgment." *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002). Instead, a defendant's motion for summary judgment cannot succeed if a reasonable jury could find that "when the evidence was considered *as a whole*, it was more likely that the defendants had" engaged in the alleged anticompetitive conduct than that they had not. *Id.* at 655-56 (emphasis added). The essential question at the summary judgment is not whether each "single piece" of evidence "is sufficient in itself to prove [the violation]. . . . The question is simply whether this evidence, considered as a whole and in combination with the economic evidence, is sufficient to defeat summary judgment." *Id.*

B. An Analysis of Individual Actions Under Section 2 is Not Sufficient to Assess Cumulative Effect

The district court's individualized and isolated analysis of the various claims it extracted from NTE's allegations is not sufficient to assess cumulative effect. When bringing a Section 2 claim, a plaintiff can plead without contradiction that individual actions are antitrust violations *and* that a group of acts, taken together, have an anticompetitive impact. *Lepage's*, 324 F.3d at 154-59 (examining alleged exclusionary conduct individually and as a whole). When a plaintiff so pleads, a court must examine the claims on both a standalone basis and as a whole. *See* Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 310c7 (5th ed. 2022) ("[A]ggregating a monopolist's disparate acts in order to determine liability makes perfect sense because "one can imagine a case in which a half dozen independently unlawful acts each had

an impact insufficient to warrant antitrust relief, but the impact of the aggregation was substantial."); *Aspen Skiing Co.* at 599 (explaining that because the "Court of Appeals considered the record 'as a whole' . . . it was not necessary for Highlands to prove that each allegedly anticompetitive act was itself sufficient to demonstrate an abuse of monopoly power").

A cumulative assessment is of even greater importance when the monopolistic conduct at issue is alleged to be interrelated and mutually reinforcing. Areeda & Hovenkamp, *Antitrust Law* ¶ 310 c7 ("[E]ach [act] viewed in isolation might be viewed as de minimis or an error in judgment, but the pattern gives increased plausibility to the claim."); *LePage's*, 324 F.3d at 162 ("The effect of 3M's conduct in strengthening its monopoly position by destroying competition by LePage's in second-tier tape is most apparent when 3M's various activities are considered as a whole. . . . 3M's bundling of its products via its rebate programs *reinforced* the exclusionary effect of those programs.") (emphasis added). This makes practical sense because a monopolist bent on preserving its dominant position is "likely to engage in repeated and varied exclusionary practices." *See* Areeda & Hovenkamp, *Antitrust Law* ¶ 310 c7. Therefore "[t]he fact finder should be permitted to consider the entire sum of unlawful exclusionary practices and their impact." *Id.*

The D.C. Circuit's decision in *U.S. v. Microsoft* is a case in point. While the court there conducted a separate examination of each category of conduct, it did not "wipe the slate clean" after each or refuse to consider how an individual action

affected others. To the contrary, the court explicitly considered the mutually reinforcing effects of defendant's anticompetitive acts. *Microsoft*, 253 F.3d at 60. For example, the court did not evaluate the effect of Microsoft's decision to deny interoperability to potential competitors in isolation but against the "backdrop of foreclosure" created by its other anticompetitive acts, including "Microsoft's exclusive deals with the leading ISVs." *Id.* at 75. And ultimately, the court's conclusion that certain actions constituted a Section 2 violation depended at least in part on interrelated conduct. For example, the court found that Microsoft's monopolization of the operating systems market was reinforced by its anticompetitive conduct in the browser market. *Id.* at 60 ("Microsoft's efforts to gain market share in one market (browsers) served to meet the threat to Microsoft's monopoly in another market (operating systems) by keeping rival browsers from gaining the critical mass of users necessary to attract developer attention away from Windows as the platform for software development.").

Just as in *Microsoft,* there is a particularly compelling reason to consider NTE's claims as a whole. The conduct NTE describes is all alleged to be part of a targeted campaign to "stop NTE in its tracks." Slip Op. at 3.. The campaign does not consist of actions that occurred sporadically over many years or where there might be ambiguity about anticompetitive intent. NTE instead alleges a systematic course of conduct by Duke Energy that included terminating NTE's access to the grid, renewing a contract on anticompetitive terms to prevent NTE from winning a key

customer, intervening in NTE's certification process, and discouraging NTE's potential customers by bringing litigation and publicly sowing doubt about the viability of NTE's project. All of these are alleged to have a single aim—preventing NTE's expansion via a new Reidsville electric generating plant. Even if any one of these actions were insufficient to achieve the goal, together they were enough to successfully stall Reidsville's development. Any analysis that breaks the scheme into individual pieces without considering the cumulative effect obscures the evidence of anticompetitive intent and effect that is only apparent when looking at the whole. For example, Duke Energy's decision to falsely publicize NTE's Reidsville project as "cancelled" alone might potentially look like an innocent mistake and Duke Energy's intervention to oppose the renewal of NTE's Certificate of Public Convenience and Necessity insufficient to have any impact on Reidsville. In context with Duke Energy's other efforts to thwart the project, however, a reasonable jury could conclude that the actions were motivated by the same anticompetitive goal as other more obviously malicious actions against NTE, namely, to create yet one more obstacle to NTE's efforts to establish a customer base for its plant. *Compare In re Suboxone Antitrust Litig.*, 967 F.3d 264, 270 (3d Cir. 2020) ("Purchasers theory of the case, however, is not simply that Reckitt's pricing of brand tablets individually caused harm. Rather, they allege that the totality of Reckitt's actions . . . suppressed generic competition and thus violated the antitrust laws.") (internal citations omitted).; *LePage's*, 324 F.3d at 162 (analyzing allegations as a whole because "the

anticompetitive effect of 3M's exclusive dealing arrangements, whether explicit or inferred, cannot be separated from the effect of its bundled rebates. 3M's bundling of its products via its rebate programs reinforced the exclusionary effect of those programs.").

II. THE DISTRICT COURT IMPERMISSABLY NARROWS THE SCOPE OF REFUSAL TO DEAL LIABILITY UNDER SECTION 2

A. The District Court's Test for Refusals to Deal Is More Demanding than Existing Precedent

The district court found two reasons, both incorrect, for why NTE's claim that Duke Energy unlawfully terminated its supply contract did not meet the prerequisites for an actionable refusal to deal claim. It determined that (1) FERC's role in granting access to the grid made it impossible to pursue a claim under *Verizon v. Trinko,* and (2) Duke Energy's denial of access did not represent a "unilateral termination of a voluntary course of dealing" at a retail price as it concluded was required by *Aspen Skiing.* Slip. Op. at 11. As a result, it found that summary judgment on this part of the claim "should independently be granted under both *Trinko* and *Aspen Skiing.*" *Trinko,* 540 U.S. at 12. In reaching this conclusion, the district court misinterpreted both cases, starting with the notion that *Trinko* and *Aspen Skiing* provide different, independent tests for refusal to deal.

1. The District Court Misconstrues the Role of Regulation in ***Trinko***

When the district court found that FERC's regulatory overlay excluded any viable refusal to deal claim, the district court went well beyond, and even contrary to, the Supreme Court's reasoning in *Verizon v. Trinko*. *Trinko* concerned whether courts should allow for *new* types of Section 2 claims to enforce regulatory mandates. *Id.* at 407. At no point did the Supreme Court in *Trinko* conclude that the regulatory regime it examined had supplanted the antitrust laws. Indeed, an antitrust savings clause in the regulation confirmed that it did not. *Id.* at 404. The Court instead analyzed the regulatory environment as one factor in deciding whether to expand antitrust liability for refusal to deal beyond current law. In contrast, the district court here invalidates the possibility of *any* antitrust claims in the presence of a regulatory obligation to interconnect. This is a misapplication of the Supreme Court's decision, which, in effect, turns *Trinko* from a shield against novel types of antitrust liability to a sword that attacks even otherwise well-established antitrust violations.

The district court's misreading of the precedent is evident from the jumbled order in which it analyzed the refusal to deal claim- first determining the outcome based solely on the regulatory overlay and only after the fact considering (inadequately) the nature of the exclusion. The district court began its refusal to deal analysis with the FERC regulations. Finding "*Trinko* rather than *Otter Tail* is more applicable to this case," the court concluded there could be no refusal to deal claim.

Slip Op. at 11. That conclusion was based solely, it would appear, on the breadth of FERC's regulatory authority. *Id.* ("Because FERC has the authority to correct Duke's sharing of its transmission network, *Trinko* rather than *Otter Tail* applies."). Having already concluded that *Trinko* compelled summary judgment, the district court only then briefly considered *Aspen Skiing* and the factors the Supreme Court previously established as constituting a viable refusal to deal. And even then, as discussed below, it did so only in the barest terms. On this shaky basis, it concluded that NTE's refusal to deal failed under "both *Trinko* and *Aspen Skiing*." *Id.*

In *Trinko,* in contrast, the Supreme Court *first* asked whether the defendant's conduct resembled the types of claims it had already found exclusionary under Section 2 in cases like *Aspen Skiing*. Only after concluding it was not an existing type of antitrust claim did the Supreme Court go on to consider the regulatory overlay of the Telecommunications Act of 1996. Moreover, the existence of the regulation alone was never outcome-determinative for the Court's analysis of the refusal to deal. Instead, the regulatory context was one part of assessing whether the Court should widen the scope of existing Section 2 liability in that case. *Id.* at 411 (describing regulatory structure as "part of [the] attention to economic context" and "one factor" in the Section 2 analysis).

The order of operations here makes all the difference. The district court's error effectively transformed the existence of regulation into a threshold question rather than, as *Trinko* did, a factor to be accounted for once the nature of the conduct has

already been assessed. The practical consequences of that mistake are profound. If allowed to stand, the court's decision would hand Duke Energy a license to engage in anticompetitive gamesmanship in its contracts with competitors simply because it is in a regulated industry. Ironically, the FERC regulations that arose from the recognition of the problem of entrenched monopolies became in the court's analysis a "get out of jail free" card for a monopolist to strengthen the wall around its position.

The Supreme Court in *Otter Tail Power Co. v. U.S.* foresaw the potential for precisely the kind of perverse result that can arise from making regulation outcome determinative when it warned that "courts must be hesitant to override the fundamental national policies embodied in the antitrust laws." 410 U.S. 366, 374 (1973). The decision in that case recognized that regulation cannot foresee every anticompetitive action a monopolist may take. As a result, no level of regulatory power invalidates the application of the antitrust laws, short of a court's conclusion that there was a pervasive regulatory scheme that showed a legislative intent to supplant the antitrust laws. To make a determination whether such intent existed, the Court, among other things, extensively reviewed the legislative history of the regulation at issue in the case and other indicia of Congress' intent. *Id.* at [x]. A conclusion that a regulation immunizes exclusionary conduct cannot be based on any less demanding an analysis. As the Court in *Otter Tail* wrote: "Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory

provisions." *Id.* at 372 (citing *U.S. v. Philadelphia Nat'l Bank*). Here, the district court made no finding that the FERC regulations created antitrust immunity, nor provided any analysis that might support such a conclusion. As a result, the district had no basis to use the existence of FERC regulation as the sole reason to reject a Section 2 claim.

2. The District Court Applies the Wrong Test Under *Aspen Skiing*

As a result of its misreading of the role of regulation, the district court hinged its decision on an analysis that this case was more like *Trinko* than *Otter Tail*. In so doing, the court did not answer the correct question. The real threshold question, and indeed the only question, on refusal to deal is whether Duke Energy's conduct in terminating the NTE contract is exclusionary. In its brief and conclusory consideration of that question, the district court again misapplied the precedent when it used the fact-specific details of the *Aspen Skiing* decision, rather than the principle the facts illustrated, to foreclose NTE's claim.

Even after the district court correctly noted that the refusal to deal analysis requires a "case by case assessment" in which "no factor is always decisive by itself," it failed to conduct its own factual analysis of NTE's claim. Slip. Op. at 11 (citing *Viamedia, Inc. v. Comcast Co.*, 951 F.3d 429, 465-67 (7th Cir. 2020). Instead, the district court simply concluded that "NTE does not allege a unilateral termination of a voluntary course of dealing nor does it have evidence that Duke refused to provide its

interconnection services at a 'retail' price." *Id.* This abbreviated analysis mistook the core of the Supreme Court's analysis in *Aspen Skiing*, that is, whether the exclusion of rivals is based on efficiency, for the case-specific facts the Court found supported its decision in favor of liability (there, a voluntary course of dealing based on a "retail" price). The district court thus transformed facts *sufficient* for an actionable refusal to deal claim into a *necessary* component.

Aspen Skiing outlined a general test for exclusionary conduct, namely, that "[i]f a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (quoting Robert Bork, *The Antitrust Paradox* 138 (1978)); *see also Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 398 (7th Cir. 2000) (while "[m]onopolists are just as entitled as other firms to choose efficient methods of doing business, [that] is not . . . what the Ski Company was doing"). The district court here appeared to adopt not this exclusion "on some basis other than efficiency" test, but a far more stringent test that requires both a "voluntary" course of dealing and a "retail price." While *Trinko* court noted these factors were helpful in determining that the refusal to deal in *Aspen Skiing* was exclusionary, neither case limited liability to these facts, and they are manifestly not the only circumstances that meet *Aspen Skiing*'s general test. *See Trinko*, 540 U.S. at 409-410. *Cf. Aspen Skiing,* 472 U.S. at 603 (noting that "the right of a monopolist to deal with whom he pleases is not so narrow that it encompasses no more than the circumstances of *Lorain Jounrnal*).

Aspen Skiing's exclusion "on a basis other than efficiency" test was not repudiated by *Trinko*. To the extent that *Trinko* discussed a voluntary course of dealing, it concluded only that dealing required by regulation "sheds no light upon the motivation of its refusal to deal—upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice." *Trinko,* 540 U.S. at 409. In other words, the fact that a prior course of dealing is not fully voluntary is neutral, not disqualifying. Moreover, the Supreme Court was clear that voluntariness is a proxy for profitability. *Id.* (distinguishing *Aspen Skiing* as involving a "voluntary (presumably profitable) course of dealing"). Where, as here, there was evidence that the prior course of dealing was profitable, save for the hoped-for anti-competitive effects of termination, imposing an additional requirement of voluntariness would simply be making regulated industries are de facto exempt from any theory of liability involving a refusal to deal. For the reasons discussed above, neither *Trinko* nor *Aspen Skiing* can be read to support that conclusion.

Because NTE's refusal to deal claim because it did not fit the exact factual scenario of *Aspen Skiing*, the district court made no effort to assess whether Duke Energy's conduct met the actual threshold test, that is, whether there was "exclusion on a basis other than efficiency." Specifically, the district court did not evaluate any procompetitive justification for Duke Energy's termination of its contract with NTE or even ask whether one could exist at all. In foregoing any analysis of Duke Energy's justifications, the district court suggested that even a termination motivated solely by

"anticompetitive malice" would not be enough for an actionable Section 2 claim in this context. This reading would be a highly problematic and dangerous blind spot in Section 2 enforcement that would exempt monopolists in regulated industries from antitrust liability even in the absence of a legislative immunity.

Moreover, in taking this approach, the district court adopted a test for refusal to deal that is more restrictive than any previously accepted standard. Even courts that have gone so far as to require that "'the monopolist's conduct must be irrational but for its anticompetitive effect" (a.k.a., the "no economic sense" test) have not been willing to forego entirely consideration of whether there is any procompetitive justification for conduct with a clear exclusionary effect. And, as commentators have noted, even the "no economic sense" test is highly problematic because, among other reasons, it may permit conduct with substantial anticompetitive effects and only minimal procompetitive benefits. *See* Areeda & Hovenkamp, *supra*, ¶ 651b3, at 106-07 (criticizing the "no economic sense" test because it would allow "an act [that would] benefit the defendant very slightly while doing considerable harm to the rest of the economy" and noting that "[n]ot all monopolizing conduct that we might wish to condemn is 'irrational' in the sense that the only explanation that makes it seem profitable is the destruction or discipline of rivals"). The strong critiques of the "no economic sense" test apply with even greater force to a test that finds the thin justification of a regulatory overlay outweighs any anticompetitive effect, regardless of magnitude.

Anticompetitive intent or the lack of an adequate business justification is a central issue in a refusal-to-deal case. *See Aspen Skiing*, 472 U.S. at 610-11("[T]he evidence supports an inference that Ski Co. was not motivated by efficiency concerns"); *Eastman Kodak Co. v. Image Tech. Servs., Inc.,* 504 U.S. 451, 453 (1992) (finding that where Kodak sought to maintain its parts monopoly and use its control over parts to strengthen its monopoly in service by, among other things, refusing to sell parts to rivals, "[l]iability turns on whether valid business reasons can explain Kodak's actions"); *see also Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469, 1481-82 (7th Cir. 1991) ("[T]he presence of a legitimate business justification reduces the likelihood that the conduct will produce undesirable effects on the competitive process."); *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 378 (7th Cir. 1986) ("Conjoined with other evidence, lack of business justification may indicate probable anticompetitive effect. But there is a clear business justification in this case."). In this case, NTE had provided ample evidence of anticompetitive intent as well as evidence that Duke Energy had translated that intent into anticompetitive effect. After all, the court did not question that Duke Energy intended to, and indeed succeeded in, preventing NTE from establishing a competing generating facility in Reidsville. *See* Slip Op. at 3 ("Duke's internal documents contain vivid rhetoric regarding its intent to compete against NTE, including that Duke planned to go to "battle" to "stop the NTE train" and "ruin NTE's plans."). Unlike in *Trinko*, the fact-finder need not rely solely on a voluntary prior course of dealing to tell the fact-finder

about Duke Energy's "dreams of monopoly." *Trinko*, 540 U.S. at 409. Duke Energy's own documents provided more than enough information about that.

In the face of prima facie evidence of anticompetitive intent and effect, a defendant must not only offer a procompetitive justification but also bear the burden of establishing it as a matter of fact. *See Microsoft ,* 253 F.3d at 59 ((holding if plaintiff makes out a prima facie case, it is defendant's obligation to establish a "nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal"); *Aspen Skiing*, 472 U.S. at 608-09 (jury reasonably rejected defendant's purported business justifications as pretextual); *Burris*, 935 F.2d at 1482 ("Whether valid business reasons motivated a monopolist's conduct is a question of fact."). Given the strong evidence of anticompetitive intent and effect on the other side of the ledger in this case, the district court's failure to seek any procompetitive justification at all is clear reversible error.

B. NTE's Claims Describe an Actionable Refusal to Deal Claim

When the case is evaluated under the appropriate test, it appears from the public record that NTE presents sufficient evidence of an actionable refusal to deal claim to justify proceeding to trial. First, by bringing to a halt NTE's plans for a new plant to compete directly with Duke Energy, the refusal to deal had an "anticompetitive effect" and harmed consumers (here, municipalities like the City of Fayetteville). *See Microsoft*, 253 F.3d at 58-59 (describing the elements of prima facie

case). Indeed, while concluding that Duke Energy's actions were not unlawful, the district court did not contest that those actions contributed to the failure of NTE's Reidsville project. Slip Op. at 18.

Second, based on the public record in this case, NTE provided ample evidence of predatory intent to establish an actionable refusal to deal claim. *Trinko* identified two indicia of predatory intent that were present in the Court's other refusal-to-deal cases (*Aspen Skiing* and *Otter Tail*) but absent in *Trinko*. The first of these is that the defendant's refusal entailed a sacrifice in short-term profits. Here, NTE provided evidence that (1) Duke Energy knew that it was violating FERC regulations by terminating NTE's contract without prior approval and could be punished, and (2) regardless of regulatory requirements, Duke Energy would have profited from its contract to provide grid access to NTE. Only its hope that the denial of access would prevent or slow down the development of NTE's competing plant made the refusal make economic sense.

The second factor is discrimination on the basis of rivalry. NTE describes evidence that, while manipulating its contract with NTE, Duke Energy provided reliable grid access to rivals who posed little competitive threat. Together with direct documentary evidence of Duke Energy's intent to "stop" the "NTE train" and "ruin NTE's plans," these were strong indicia of predatory intent that the district court ignored. *See Trinko*, 540 U.S. at 409-410; *see also Olympia Equip. Leasing*, 797 F.2d at 377 ("The essential feature of the refusal-to-deal cases [is] a monopoly supplier's

discriminating against a customer because the customer has decided to compete with it.").

Third, NTE's refusal-to-deal claim does not implicate the policy justifications for limiting such claims, at least so far as it appears from the papers in the case. *See Trinko*, 540 U.S. at 407-08 (citing as policy factors administrability, diminishing investment incentives, and facilitating collusion). There is little or no administrability problem where, as here, the monopolist has previously sold the product to the rival or sells it to others, so a ready benchmark for setting the terms of dealing is available. *See MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1133 (9th Cir. 2004); *see generally* Steven C. Salop, *Refusals to Deal and Price Squeezes by an Unregulated, Vertically Integrated Monopolist,* 76 Antitrust L.J. 709, 717 (2010). Moreover, using such a benchmark at which the monopolist has otherwise been willing to deal should eliminate the risk that the monopolist's compensation will be inadequate to encourage investment. *See, e.g.*, John Thorne, *A Categorical Rule Limiting Section 2 of the Sherman Act:* Verizon v. Trinko, 72 U. Chi. L. Rev. 289, 298-99 (2005). And concerns about investment incentives are low when the defendant is already providing access to other competitors. *Cf.* Herbert Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 Colum. Bus. L. Rev. 1, 102 (1995) (explaining that a free-rider argument is hard to maintain when venture "pursues a general policy of taking on new members but selectively excludes a few").

Finally, *Trinko*'s concern with the risk of "collusion" cuts in *favor* of prohibiting Duke Energy's conduct. If Duke Energy is free to discriminate between providers

who "stay in their lane" and those who dare to challenge Duke Energy in areas where it traditionally competes, the threat to terminate can function as a highly efficient means of market allocation.

CONCLUSION

The district court in this case made key misreadings of the controlling precedent on Section 2 claims. As a result, it failed to make a full assessment of NTE's monopolization case and wrongly granted Duke Energy summary judgment on those claims. Specifically, the district court's flawed analysis allowed it, on one hand, to ignore evidence of Duke Energy's anticompetitive intent and the clear anticompetitive effect of the failure of NTE's Reidsville plant and, on the other, not to even seek, let alone probe, any procompetitive justification for Duke Energy's exclusionary conduct. Given these important lapses in the analysis, the district court's summary judgement on NTE's Section 2 claims should be reversed. To let its analysis stand unchallenged poses a serious threat to effective Section 2 enforcement in this Circuit by extending antitrust immunity to regulated monopolists even in the absence of any legislative intent to do so.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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